# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 284

NICHOLAS A. STIRONE, PETITIONER

*v.*

T. W. MARKLEY, WARDEN, UNITED STATES PENITENTIARY, TERRE HAUTE, INDIANA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 345 F. 2d 473. The opinion of the United States District Court for the Southern District of Indiana, which is unreported, is set out at R. 113–115.

### JURISDICTION

The judgment of the court of appeals was entered on April 8, 1965. The petition for a writ of certiorari was filed on June 24, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



783-932—65

## STATUTE INVOLVED

28 U.S.C. 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

## QUESTIONS PRESENTED

1. Whether the failure of the sentencing court to hold a plenary hearing on petitioner's Section 2255 motion rendered that remedy "inadequate and ineffective" and required another district court to entertain his petition for writ of habeas corpus.

2. Whether Section 2255 is inadequate to test petitioner's claim under the Sixth Amendment because it forecloses the filing of a "successive motion for similar relief."

3. Whether Section 2255 is an unconstitutional suspension of the writ of habeas corpus.

## STATEMENT

Petitioner is incarcerated in the federal penitentiary at Terre Haute, Indiana. (Petition, p. 7.) On

July 30, 1963, he filed a motion to vacate sentence under 28 U.S.C. 2255 in the United States District Court for the Western District of Pennsylvania (R. 85). The motion alleged that at his trial petitioner had been denied due process in that (1) the trial judge had not been present during the selection and *voir dire* examination of the jury; (2) the deputy clerk rather than the trial judge had conducted the *voir dire;* and (3) the court reporter failed to take down the proceedings related to the selection and interrogation of the jury. Affidavits in support of the motion were filed (R. 93–105) and a hearing was held on September 10, 1963 (R. 48–63). Petitioner was represented by counsel at the hearing, but the court did not order the production of petitioner for the hearing on the ground that there were no factual matters to be resolved (R. 50–51). The district court's findings of fact and conclusions of law were filed on October 7, 1963 (R. 64–76). The court denied the Section 2255 motion on the grounds that there was no showing of prejudice resulting from the manner that the jury was empanelled and examined; that errors in the process should have been raised on the appeal which had been taken from the conviction; and that the irregularities were not fundamental error amounting to a denial of due process (R. 75–76). An appeal was taken from this denial.[1]

[1] The Court of Appeals for the Third Circuit affirmed the judgment of the trial court in the Section 2255 proceeding on February 11, 1965, holding that the irregularities in the jury selection procedure were "minor procedural mistakes" and were not of "constitutional proportions." 341 F. 2d 253, 256–257 (C.A. 3), certiorari denied, 381 U.S. 902.

While this proceeding was pending on appeal, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Indiana (R. 1–4) raising the same due process claims as were presented in the Section 2255 motion. He also alleged that these irregularities denied him his Sixth Amendment right to be tried by an impartial jury (R. 2). The petition was amended to allege that petitioner's remedy under 28 U.S.C. 2255 was inadequate and ineffective in that Section 2255 was an unconstitutional statute suspending the writ of habeas corpus (R. 8–10). On July 13, 1965, an order to show cause was served on respondents (R. 5) and subsequently various motions and memoranda were filed (R. 6–111).

On August 7, 1964, the district court denied the application for habeas corpus ruling that petitioner had not shown that his remedy under Section 2255 was inadequate or ineffective to test the legality of his detention; that his Sixth Amendment claim should be raised first in the sentencing court in a second motion under Section 2255; and that the constitutionality of Section 2255 was well established (R. 114–115). On April 8, 1965, the court of appeals affirmed.

## ARGUMENT

1. In his petition for habeas corpus, petitioner alleges that irregularities in selecting and empanelling the jurors for his trial deprived him of due process and of trial by an impartial jury. Such claims are properly raised in a motion to vacate sentence filed in the sentencing court pursuant to 28 U.S.C. 2255.

Petitioner had in fact previously raised the Fifth Amendment issue in the United States District Court for the Western District of Pennsylvania. While the matter was pending on appeal,[2] petitioner filed the instant petition for habeas corpus.

Petitioner claims that his remedy under Section 2255 was inadequate because the sentencing court did not require his presence at the hearing and because he was not afforded a full evidentiary hearing. But this would be required only if it appeared that the claim was substantial or that there were crucial issues of fact to be developed. *Sanders* v. *United States,* 373 U.S. 1; *Machibroda* v. *United States,* 368 U.S. 487, 495–496. As stated in *Sanders* (at 20–21):

> Not every colorable allegation entitles a federal prisoner to a trip to the sentencing court. Congress, recognizing the administrative burden involved in the transportation of prisoners to and from a hearing in the sentencing court, provided in § 2255 that the application may be entertained and determined "without requiring the production of the prisoner at the hearing." This does not mean that a prisoner can be prevented from testifying in support of a substantial claim where his testimony would be material. However, we think it clear that the sentencing court has discretion to ascertain whether the claim is substantial before granting a full evidentiary hearing.

If there had been error in not ordering petitioner's presence and holding a full evidentiary hearing, it

[2] Subsequently, the court of appeals affirmed the district court's denial, 341 F. 2d 253, and this Court denied certiorari, 381 U.S. 902.

still would not follow that petitioner lacked an effective remedy. Indeed, petitioner has had appellate review of the district court's denial of his Section 2255 motion and this Court has denied certiorari. That petitioner was not successful in convincing the courts that he was entitled to prevail is not tantamount to a showing that the Section 2255 remedy is in any way "inadequate or ineffective" to test his claims.[3]

2. In his application for habeas corpus, petitioner asserts that the empanelling and examination of the jury violated his rights under the Sixth Amendment. Previously, he had asserted only Fifth Amendment rights. The district court ruled that this matter should be raised in a new Section 2255 motion in the sentencing court.

Petitioner's argument is that the provision of Section 2255 that a "sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner," means that the sentencing court could not entertain his Sixth Amendment claim because the relief sought is similar, and that thus his remedy under that section is inadequate.

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[3] Petitioner also complains that the delay in resolution of his motion rendered his remedy inadequate. The statute requires a "prompt" hearing. The motion was filed on July 30, 1963, and the hearing was held on September 10, 1963. This lapse hardly amounts to a delay which would render the remedy inadequate or ineffective. That the decision of the court of appeals was not handed down until February 1965, was due in large part to the litigation carried on by petitioner to amend the record on the Section 2255 motion, which involved an intermediate appeal to the Court of Appeals.

In *Sanders* v. *United States*, 373 U.S. 1, this Court held that *res judicata* did not apply to Section 2255 proceedings and that successive applications which raise new grounds must be entertained by the sentencing court. Whether new grounds are asserted is a matter to be determined in the first instance by the sentencing court.[4]

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be denied.

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AUGUST 1965.

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[4] The constitutionality of Section 2255 is too well settled by recent decisions of this Court to require discussion. It is apparent from the foregoing that there is nothing in this case to suggest that the procedures open to petitioner were in any way incommensurate with what would have been available to him under the ancient writ.

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